SUPREME COURT, U. S.
No. 73-855
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In the Supreme Court of the United States

OCTOBER TERM, 1973

MILTON SANTIAGO AND JAMES BRETTHOLZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners challenge the admissibility of testimony that they had previously engaged in narcotics transactions similar to the one involved in their trial.

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of substantive narcotic offenses and conspiracy, in violation of 21 U.S.C. 841(a)(1) and 846.[1] Petitioner Santiago was sentenced to five years' imprisonment and a special parole term of three years. Petitioner Brettholz was sentenced to five years' imprisonment and fined $3,000. The court of appeals affirmed in a comprehensive opinion, on which we principally rely.[2]

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[1]Petitioner Santiago was also convicted of assault on a federal narcotics agent, in violation of 18 U.S.C. 111 and 1114.

[2]The portion of the opinion dealing with the contention here urged is found in Pet. App. 7a-10a.

Co-conspirators Rosenblum, Prince and Posner, who pleaded guilty before trial, testified as government witnesses. In brief, the evidence showed that these three planned to buy cocaine from Brettholz and Santiago. They all met at Prince's house and discussed the transaction. Narcotics agents interrupted the meeting and arrested all present except Brettholz, who escaped but later turned himself in. A search of the premises revealed seven ounces of cocaine. At trial, both petitioners testified that they had gone to the Prince house not to sell cocaine, but to buy marihuana from Posner for their personal use. Over defense objection, Posner testified that within the year prior to this transaction he had bought cocaine from Brettholz on ten occasions (Pet. App. 1a-7a).

Evidence of these prior transactions was offered to show "'that there was intent to distribute on the part of defendant [Brettholz] as opposed to being used for his own personal use'" (Pet. App. 8a). Petitioners' contention that "'there was not and could not be any real issue of intent in the case'" (*ibid.*) is untenable in view of their testimony that they had met at Prince's house for the purpose of buying marijuana for their own use. The evidence of a continuing relationship with Posner tended to show a common scheme, plan and intent. The evidence was properly admitted. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 81-82; *United States* v. *Turner*, 423 F. 2d 481 (C.A. 7), certiorari denied, 398 U.S. 967; *United States* v. *Anthony*, 444 F. 2d 484 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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